NO. 15-1029 (CONSOLIDATED WITH NO. 15-1046)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
Petitioner,

V.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW FROM A DECISION OF THE NATIONAL LABOR RELATIONS BOARD

PETITION FOR REHEARING AND REHEARING EN BANC

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a division of The Noel Corporation

June 29, 2016

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INTRODUCTION AND RULE 35 STATEMENT

This case presents the question of whether an administrative agency that lost jurisdiction by operation of a statute when the agency's decision was challenged in the Court of Appeals may *sua sponte* assume jurisdiction and redecide the case after the court vacated the agency decision and when the agency never sought a remand and no remand was ever issued by the court.

The mandate provided only:

> …the petition for review is granted the Board's order vacated and the cross application is denied. In accordance with the opinion of the court…

Some forty (40) months after the decision and mandate (Addendum A3) was issued a different panel[1] of this court found that a remand was not necessary because the agency decision was vacated due to an improperly constituted board and the original panel "expected the Board would revisit the merits of the case again with a full complement of members." Neither the original decision or the mandate provided a remand or contained any such indication or expectation.

The panel disregards the decision of the Supreme Court in *NLRB v. Donnelly Garment Co.*, 330 US 219, 226-227 (1947) in which the Court rejected the notion that the appellate court's subjective understanding of its own mandate was "controlling" and held that it was "necessary…to revert to the **precise terms** of the

[1] The panels had one member in common, Judge Sentelle.

court's mandate. *Donnelly,* 330 US at 226 (emphasis added). Here the panel disregarded the "precise terms" of the prior mandate and determined what the original panel may have subjectively expected. Under the "precise terms" of the court's prior opinion, judgment, and mandate no remand was authorized or contemplated.

The panel decision is also contrary to decisions of this circuit. An inferior court (or agency) may not deviate from the mandate issued by the appellate court. *Role Models America Inc. v. Geren*, 514 F.3d 1308, 1311 (D.C. Cir. 2008). In *City of Cleveland, Ohio, v. Federal Power Commission*, 561 F.2d 344 (D.C. Cir. 1977) it was held that "…[an agency] is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case." *Id.* at 348. However, that is what the Board did, it exceeded the "precise terms" of the mandate. The panel decision also is contrary to this Circuit's decision of *George Banta Co. Inc. v. NLRB,* 686 F.2d 10 (DC Cir. 1982) which holds "absent a remand, the Board may neither reopen or make any additional rulings on a case once exclusive jurisdiction vests in the reviewing court." 686 F.2d at 294. The consideration of the mandate is limited to what it actually stated, not what the panel might have or could have stated. The parties cannot be left to guess what the court intends. The decision of the panel, which in essence allows an implied remand, opens the door to confusion and uncertainty in

this and subsequent decisions because there are some twenty five (25) statutes in which a federal agency loses jurisdiction upon exclusive jurisdiction vesting in the reviewing Court of Appeals. (See attached Appendix A). In the absence of a remand each of those agencies are left with the discretion to reassert jurisdiction and redecide the case.

STATEMENT

1. On February 8, 2012 the NLRB issued its decision in *Noel Canning*, 358 No. 4 (2012) in which it found Noel Canning had violated Section 7 of the Act.
2. Noel Canning petitioned this court on February 24, 2012 to review the decision of the Board. The NLRB filed a cross action for enforcement.
3. The National Labor Relations Act unambiguously states that "[upon] the filing of the [Board] record [with the court of appeals] the jurisdiction of the court shall be exclusive and its judgment and decree shall be final" except upon review by the Supreme Court. 29 U.S.C. § 160(e)
4. This court granted Noel's petition and vacated the Board's order. *Noel Canning v NLRB*, 705 F.3d 490, 515 (D.C. Cir. 2013). The decision found the Board did not have a quorum because the recess appointments were improper.
5. After granting a petition for certiorari by the Board, on June 26, 2014 the United States Supreme Court affirmed this Court's judgment of the case

NLRB v. Noel Canning,134 S.Ct. 2550 (2014).

6. Neither decision, judgment, or mandate remanded the matter to the Board. *Noel Canning*, 705 F.3d at 515; *NLRB v. Noel Canning*, 134 S.Ct. at 2578; Appendix D.
7. Neither the NLRB nor Union (as intervenor) requested a remand to the Board for further proceeding.
8. On August 15, 2014 the Board (as newly constituted) decided on its own initiative to "consider the case anew…" *Noel Canning*, 361 NLRB No. 129 p.1 (2014).
9. On December 16, 2014 the Board asserted that it conducted a "de novo review" and adopted the same decision as that issued by the improperly appointed Board. *Noel Canning*, 301 NLRB No. 129 (2014).
10. A Petition to Review the 2014 Board order was brought to this court, on February 4, 2015 and on May 17, 2016 a panel of this court denied Noel's petition for review (in which it was claimed the Board lacked jurisdiction because there was no remand). The second panel held the original decision was not a merits decision and that the first panel expected the Board would revisit the decision. *Noel Canning v. NLRB*, _F.3d_ (D.C. Cir. 2016) (Addenda A3 and A4).

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ARGUMENT

The preclusive effect of the Court of Appeals mandate results from the scope of its jurisdiction and the direction of its judgment and mandate. When a review is sought of a Board decision the NLRB loses jurisdiction and jurisdiction of the Court of Appeals is "exclusive." 29 U.S.C. § 160(e). Jurisdiction remains with the Court until it acts to pass jurisdiction to a lower court or agency.

There was no remand in the opinion, judgment, or mandate of this court in its January 25, 2013 decision, or in that of the U.S. Supreme Court. *Noel Canning*, 705 F.3d at 515, *Noel Canning*, 134 S.Ct. at 2578. The judgment and mandate stated only that the "Board's order is vacated and the cross application for enforcement denied…" (Appendix D). Absent remand, exclusive jurisdiction remained with the court. *George Banta Co.*, 686 F.2d at 16; 29 U.S.C. § 160(e). See also: *Mississippi v. Louisiana*, 506 US 73, 77 (1992) [the uncompromising language of 28 U.S.C. § 1251(e) which gives this court "original and exclusive jurisdiction…necessarily denies jurisdiction of such cases to any other federal court…the plain meaning of exclusive ("debar from possession")] . "It follows that absent an order to remand or some express qualification in the judgment, finality is presumed." *Service Int'l Union Local 750 v. NLRB*, 640 F.2d 1042, 1045 (9th Cir. 1981). An inferior court (or agency) may not deviate from the mandate issued by

the appellate court *Briggs v. Pennsylvania R. Co.*, 334 US 304, 306 (1948); *Role Models America Inc. v. Geren*, 514 F.3d at 134.

However, that is what the Board did. Despite the lack of remand the Board reassumed jurisdiction and redecided the case. When the authority and jurisdiction of the NLRB to redecide the case without remand was challenged a panel of this court determined that a remand was not necessary because the initial decision of this court (which was decided 40 months earlier) was not a decision on the merits and that the prior panel deciding the initial decision "expected the Board to revisit the merits of the case with a full complement of members." Neither the original decision nor the mandate made any such statement or provide any such indication. The Supreme Court has rejected that a court's subjective understanding of its own mandate is "controlling" and holds that it is necessary "to revert to the **precise terms** of the Court's mandate." *Donnelly Mfg.*, 330 US at 220 (emphasis added). Unfortunately this panel has done what *Donnelly* forbids: it has relied upon what may have been an unexpressed subjective understanding instead of the "precise terms" of the mandate. Doing so was in error as the "precise terms" of the mandate did not provide a remand.

It is a familiar appellate practice to remand causes for further proceedings without deciding the merits. *Ford Motor Co. v. NLRB*, 305 US 364, 377 (1939). This court has long used "boiler plate" language to indicate its intention to

relinquish jurisdiction over a particular controversy. *NLRB v. Wilder Mfg. Co.*, 454 F.2d 995, 998 (D.C. Cir. 1971). This court and others have recently expressed a clear intent to remand cases held in abeyance pending the Supreme Court's review of *Noel Canning* and in each case the court clearly used the word "remanded." (See Appendix C). In each case the court clearly expressed its intent by using the word "remand." It did not do so here. Absent an order to remand or some other express qualification in the judgment exclusive jurisdiction remains with the court. See *SEIU Local 250*, 640 F.2d at 1045 and the agency has no authority to act.

The NLRB never requested a remand in any filing with this court prior to the January 2013 decision or at any time following the Supreme Court's *Noel Canning* decision. A party dissatisfied with a mandate may apply to the reviewing court for correction or interpretation, *Bergh v. Washington*, 535 F.2d 505 (9th Cir. 1976); *Brittingham v. Commissioner*, 451 F.2d 315 (5th Cir. 1971); *City of Cleveland*, 561 F.2d at 347 or may seek appellate review *International Union of Mine, Mill and Smelter Workers, Locals No. 15, et al. v. Eagle-Picher Mining & Smelting Co. et al.*, 325 U.S. 335 (1945). Here the Board never sought correction or interpretation of the mandate and never at any time sought remand.

By not seeking a remand, correction, or interpretation the Board waived the issue. An issue that falls within the scope of the judgment appealed from but not raised in the opening brief is waived. *Engle Industries v. Lock Former Co.*, 166

F.3d 1379, 1383 (Fed. Cir. 1999). In *NLRB v. Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996) the court noted that the Board's failure to request a remand explained the court's prior denial of enforcement without a remand: "at no time did the Board ever suggest that a remand…would be an appropriate alternative disposition of the case (the Board unequivocally requested "that judgment should enter enforcing the Board's order in full.")…" 81 F.3d at 26. Here the Board failed to request that relief and that choice should result in the same result: "unless remanded by this Court all issues within the scope of the appealed judgment are deemed incorporated within the mandate and are thus precluded from further adjudication." *Retractable Technologies Inc. v. Becton Dickinson and Co.*, 757 F.3d 1366, 1371 (Fed. Cir. 2014). The NLRB waived remand.[2]

Nor is there any logic or support for distinguishing a "non-merits" case. The statute provides no "non-merits" exception to the requirement of a remand and does not provide for the Board to reassert jurisdiction when cases are arguably disposed of on a non-merits basis. Courts often resolve cases without reaching the merits of a case. There is no rational basis for distinguishing a decision based on the merits or a "non-merits" decision. Both should require a clear remand before the lower court or agency may resume jurisdiction and act further. Regardless of the nature of the decision the agency must have a remand before it can act.

[2] The NLRB's waiver of the issue of remand was raised before the panel and the panel did not address the issue.

Otherwise the panel decision creates a murky world of decisions which the NLRB may pick and choose from to revisit based upon its own view of what constitutes a non-merits decision. There are any number of non-merits decision cases which the panel decision now opens for further agency actions because there was arguably a non-merits decision. (Appendix B).

The implication of the panel decision which allows an administrative agency to reassert jurisdiction without a remand are far broader than the present matter and this particular agency. There are some 25 statutes (Appendix A) with similar provisions that cause the agency to lose all jurisdiction when a decision is challenged in the Court of Appeals. Had Congress intended that agencies, including the NLRB, could automatically reassert jurisdiction, it would have so provided in the statute. If the *Donnelly* Supreme Court intended that a remand could be implied or presumed, it would not have looked to the "precise terms" of the mandate as it did in *Donnelly*. If this Circuit had meant for the NLRB to have the power to reassume jurisdiction as it chose (and without remand) it would not have held as it did in *George Banta* that "absent remand exclusive jurisdiction remained with the court" 680 F.2d at 16.

CONCLUSION

For the reasons stated above, the petition should be granted.

Respectfully submitted,

/s/ Gary E. Lofland
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June 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of June 2016, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Gary E. Lofland
Gary E. Lofland, #37080

APPENDIX

5 U.S.C. §7123(c) (Federal Labor Relations Authority)

7 U.S.C. §136n(b) (EPA Administrator)

7 U.S.C. §194 (Agriculture Secretary)

7 U.S.C. §228b-3 (Agriculture Secretary)

8 U.S.C. §1324b (ALJ national origin/citizenship status discrimination)

12 U.S.C. §1467a(j) (Federal Reserve System Board of Governors)

12 U.S.C. §1786(j)(2) (National Credit Union Administration Board)

12 U.S.C. §1818(h) (FDIC/ Federal Reserve System Board of Governors)

12 U.S.C. §2266(b) (Farm Credit Administration)

12 U.S.C. §5563(b)(4) (Bureau of Consumer Financial Protection)

15 U.S.C. §21(c, d) (Surface Transportation Board)

15 U.S.C. §45(c, d) (FTC)

15 U.S.C. §§77i(a), 80a-42(a), 80b-13(a) (SEC)

15 U.S.C. §687e(f) (SBA Administrator)

15 U.S.C. §717r(b) (Federal Power Commission)

15 U.S.C. §1710(a) (Bureau of Consumer Financial Protection Director)

15 U.S.C. §3416(a)(4) (FERC Commission)

16 U.S.C. §825l(b) (Federal Power Commission)

21 U.S.C. §355(h) (HHS Secretary)

25 U.S.C. §4161(d) (HUD Secretary)

27 U.S.C. §204(h) (Treasury Secretary)

29 U.S.C. §210(a) (Labor Secretary)

29 U.S.C. §660(a) (Occupational Safety and Health Review Commission)

30 U.S.C. §816(a)(1) (Federal Mine Safety and Health Review Commission)

42 U.S.C. §§1320a-7a(e), 1320a-8(d) (HHS Secretary)

42 U.S.C. §5311(c) (HUD Secretary)

43 U.S.C. §1349(c) (Interior Secretary)

45 U.S.C. §355(f) (Railroad Retirement Board)

Forum non conveniens: *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp.*, 549 U.S. 422, 424, 127 S.Ct. 1184, 1187 (2007); *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 2008)

Mootness: *De Volld v. Bailar*, 568 F.2d 1162, 1165–66 (5th Cir.1978)

Lack of personal jurisdiction: *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 586, 119 S.Ct. 1563 (1999); *In re Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 2008)

Lack of subject matter jurisdiction: *Smith v. Texas*, 550 U.S. 297, 324, 127 S.Ct. 1686 (2007)

Endangered Species Act 60 days notice requirement: *Friends of Animals v. Ashe*, 51 F.Supp.3d 77, 88 n. 5 (D.C. D.C. 2014)

Statute of limitations: *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4, 125 S.Ct. C1 (2005); *United States v. Danzell*, ___F.Supp.3d ___, Slip Copy 2015 WL 7588278 (W.D. Va. 2015)

Failure to exhaust administrative remedies: *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4, 125 S.Ct. 2641 (2005)

Procedural default: *Gonzalez v. Crosby*, 545 U.S. 524, 532 n. 4, 125 S.Ct. 2641 (2005)

Improper venue: *Herbert v. Sebelius*, 925 F.Supp.2d 13, 17 (D.C. D.C. 2013)

EEOC failure to conduct adequate investigation and conciliation prior to suit: *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S.Ct. 1642, 1651-1653 (2016)

Sovereign immunity: *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S.Ct. 1642, 1652-1653 (2016)

Failure to exhaust tribal court remedies: *Valenzuela v. Silversmith*, 699 F.3d 1199, 1205 (10th Cir. 2012)

Lack of prudential standing: *Sierra Club v. E.P.A.*, 292 F.3d 895, 902 (D.C. Cir. 2002)

Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB,
564 F.3d 469 (D.C. Cir. 2009)

Allied Mech. Servs. v. NLRB,
Case Nos. 08-1213 and 08-1240 (D.C. Cir. Sept. 20, 2010)

Northeastern Land Servs. v. NLRB,
Case No. 08-1878 (1st Cir. July 30, 2010)

Cnty. Waste of Ulster, LLC v. NLRB,
385 Fed.Appx. 11 (2d Cir. 2010)

J.S. Carambola, LLP v. NLRB,
Case Nos. 08-4729, 09- 1035 (3d Cir. July 1, 2010)

Diversified Enter., Inc. v. NLRB,
Case No. 09-1464, 09-1537 (4th Cir. July 23, 2010)

Bentonite Performance Mineral LLC v. NLRB,
382 Fed.Appx. 402 (5th Cir. 2010)

Galicks, Inc. v. NLRB,
383 Fed.Appx. 516 (6th Cir. 2010)

NLRB v. Spurlino Materials, LLC,
Case Nos. 09- 2426, 09-2468 (7th Cir. July 8, 2010)

Leiferman Enters., LLC v. NLRB,
Case Nos. 09-3721 & 09-3905 (8th Cir. July 8, 2010)

NLRB v. Legacy Health Sys.,
Case No. 09-73383 (9th Cir. July 9, 2010)

Teamsters Local Union No. 523 v. NLRB,
624 F.3d 1321 (10th Cir. 2010)

CSS Healthcare Servs., Inc. v. NLRB,
Case Nos. 10-10568, 10-10914 (11th Cir. July 16, 2010)

Marquez Bros. Enterprises, Inc. v. NLRB,
Case Nos. 12-1278, 12-1357 (D.C. Cir. November 18, 2014)

Lancaster Symphony Orchestra v. NLRB,
Case Nos. 12-1371, 12-1384 (D.C. Cir. October 21, 2014)

Nestle Dreyer's Ice Cream Co. v. NLRB,
Case Nos. 12-1684, 12-1783 (4th Cir. July 29, 2014)

Appendix C

Oak Harbor Freight Lines, Inc. v. NLRB,
Case Nos. 12-1226, 12-1358, 12-1360, (D.C. Cir. August 1, 2014)

NLRB v. Instituto Socio Economico Communitario, Inc.,
Case No. 13-1688 (1st Cir. October 3, 2014)

NLRB v. Dover Hospitality Servs.,
Case No. 13-2307 (2d Cir. July 2, 2014)

NLRB v. Salem Hosp. Corp.,
Case No. 12-3632 (3d Cir. July 10, 2014)

Dresser-Rand Co. v. NLRB,
576 Fed.Appx. 332 (5th Cir. 2014)

Little River Band of Ottawa Indians Tribal Gov't v. NLRB,
Case Nos. 13-1464, 13-1583 (6th Cir. Aug. 13, 2014)

Contemporary Cars, Inc. v. NLRB,
Case Nos. 12-3764, 13-1066 (7th Cir. Oct. 3, 2014)

Relco Locomotives, Inc. v. NLRB,
Case Nos. 13-2722, 13-2812 (8th Cir. July 1, 2014)

DIRECTV Holdings, LLC v. NLRB,
Case Nos. 12-72526, 12-72639 (9th Cir. July 2, 2014)

Int'l Union of Operating Engineers, Local 627 v. NLRB,
Case Nos. 13-9547, 13-9564 (10th Cir. July 2, 2014)

NLRB v. Gaylord Chem. Co.,
Case Nos. 12-15404, 12-15690 (11th Cir. August 13, 2014), *See also Gestamp South Carolina, LLC v. NLRB*, 547 Fed.Appx. 164 (4th Cir. 2013) (denying enforcement and expressly remanding to the Board)

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12-1115

September Term, 2012
FILED ON: JANUARY 25, 2013

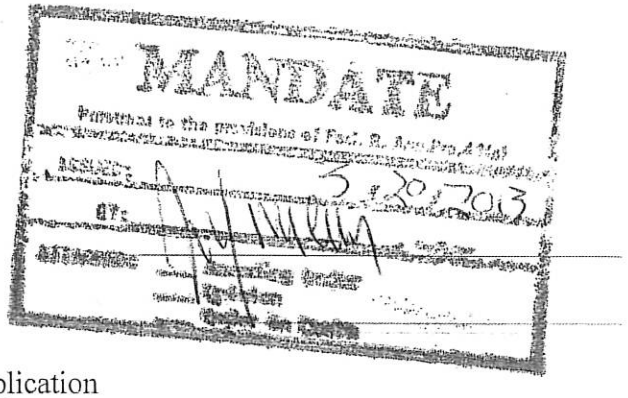
NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 760,
INTERVENOR

Consolidated with 12-1153



On Petition for Review and Cross-Application
for Enforcement of an Order of
the National Labor Relations Board

Before: SENTELLE, *Chief Judge*, HENDERSON and GRIFFITH, *Circuit Judges*

JUDGMENT

These causes came on to be heard on the petition for review and cross-application for enforcement for Enforcement of an Order of the National Labor Relations Board and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is granted, the Board's order is vacated, and the cross-application for enforcement is denied, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s/
Jennifer M. Clark
Deputy Clerk

Date: January 25, 2013

Opinion for the court filed by Chief Judge Sentelle.
Concurring opinion filed by Judge Griffith.

Appendix D

ADDENDUM

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and D.C. Circuit Rule 26.1, Petitioner makes the following disclosures:

1. Petitioner Noel is a division of The Noel Corporation. Noel has no other parent corporations, and no other publicly-held company has a 10% or greater ownership interest in Noel. Noel is engaged in the manufacture and distribution of carbonated beverages (Pepsi products) in Central and Eastern Washington and Northern Oregon.

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

A. Parties and Amici. Noel Canning a division on the Noel Corporation was the respondent before the Board and is the petitioner/cross-respondent before the Court. The respondent/cross-petitioner is the NLRB. Teamsters Local 760 was the charging party before the Board. The Board's General Counsel was also a party before the Board. Undersigned counsel is unaware of any *amici* in this Court.

B. Rulings Under Review. This case is before the court on Noel Canning's petition for review and the Board's cross-application for enforcement of a Decision and Order issued by the Board on December 16, 2014 and is reported at 301 NLRB No. 129.

C. Related Cases. The ruling under review has not previously been before this Court or any other court. Related cases within the meaning of this Court's Rule 28(a)(1) include *Big Ridge Inc. v. NLRB*, 808 F.3d 705 (7th Cir. 2015); *Huntington Ingalls Inc. v. NLRB*, 631 F. App'x 127 (4th Cir. 2015); *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011).

/s/ Gary E. Lofland
Gary E. Lofland, #37080

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Submitted March 24, 2016 Decided May 17, 2016

No. 15-1029

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1046

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board

Gary E. Lofland and *Mark David Watson* were on the briefs for petitioner.

Richard F. Griffin, Jr., General Counsel, National Labor Relations Board, *John H. Ferguson*, Associate General Counsel, *Linda Dreeben*, Deputy Associate General Counsel,

Elizabeth A. Heaney, Supervisory Attorney, and *Heather S. Beard*, Attorney, were on the brief for respondent.

Before: ROGERS and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SENTELLE.

SENTELLE, *Senior Circuit Judge*: Noel Canning petitions for review of a decision and order of the National Labor Relations Board, which determined that the petitioner violated the National Labor Relations Act and ordered relief against petitioner. Petitioner argues that our disposition vacating a prior order in the same dispute left no authority with the Board to enter this further decision and order. The Board cross-petitions for enforcement. Concluding that there is no merit in petitioner's claims, we deny the petition and grant the cross-petition for enforcement.

BACKGROUND

This case comes to our Court for a second time. In 2012, petitioner Noel Canning, a division of the Noel Corporation, petitioned this Court to review a decision and order of the National Labor Relations Board holding that Noel Canning had violated the National Labor Relations Act (NLRA) by failing to execute a collective bargaining agreement with its employees. We vacated the Board's decision on the ground that three of the Board's five members had been improperly appointed under the Recess Appointments Clause. *See Noel Canning v. NLRB* (*Noel Canning I*), 705 F.3d 490 (D.C. Cir. 2013). On certiorari, the Supreme Court affirmed this Court's decision concluding that the appointments were invalid, albeit

on modified reasoning. *See NLRB v. Noel Canning* (*Noel Canning II*), 134 S. Ct. 2550 (2014).

On December 16, 2014, a panel of the now properly reconstituted Board issued a new decision and order essentially adopting the Board's 2012 decision and ordering Noel Canning, *inter alia*, not to refuse to bargain with the Teamsters Local 760 chosen by employees as their exclusive representative. *See Noel Canning*, 361 NLRB No. 129 (Dec. 16, 2014). On February 2, 2015, Noel Canning filed a petition for review of the Board's 2014 decision and order with this Court. One month later, the Board filed a cross-application for enforcement. Petitioner offers no challenge to the merits of the Board's latest ruling. Instead, it argues that the Board lacked jurisdiction to issue the 2014 decision and order because this Court's opinion in *Noel Canning I* only vacated—never remanded—the Board's 2012 decision and order. Three of our sister circuits have already rejected substantially identical challenges to other Board orders. *See Big Ridge, Inc. v. NLRB*, 808 F.3d 705 (7th Cir. 2015); *Huntington Ingalls Inc. v. NLRB*, 631 F. App'x 127 (4th Cir. 2015); *NLRB v. Whitesell Corp.*, 638 F.3d 883 (8th Cir. 2011). We do the same today. Because this Court's decision and mandate in *Noel Canning I* are best interpreted as allowing a properly reconstituted Board to reconsider the merits, we deny Noel Canning's petition for review. We grant the Board's cross-application for enforcement because the 2014 decision and order, like the 2012 decision and order, was supported by substantial evidence.

DISCUSSION

Noel Canning argues that this case is controlled by 29 U.S.C. § 160(e), which states that "[u]pon the filing of the [Board] record with [the court of appeals] the jurisdiction of

the court shall be exclusive and its judgment and decree shall be final" except upon review by the Supreme Court. The statute also provides that a court may "make and enter a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board." *Id.* Notably, § 160(e) makes no mention of remand or, more generally, when the Board may reassume jurisdiction after vacatur. A court's authority to remand comes instead from its "equity powers." *Ford Motor Co. v. NLRB*, 305 U.S. 364, 373 (1939). Therefore, this case is not about § 160(e) as Noel Canning would have it, but rather the interpretation of our mandate in *Noel Canning I*.

The question presented is whether our mandate in *Noel Canning I* permits a properly reconstituted Board to reconsider the merits of the case. Noel Canning argues that it does not. Judicial mandates, Noel Canning claims, must be read according to their "precise terms." *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 226 (1947). Since the *Noel Canning I* opinion and judgment stated only that Noel Canning's petition for review is granted, the Board's order is vacated, and the cross-application for enforcement is denied—with no mention of remand—Noel Canning contends it cannot be read as giving the Board, once properly constituted, authority to take up the case again. *See Noel Canning I*, 705 F.3d at 515; Judgment, *Noel Canning I*, No. 12-1115, Doc. No. 1417095 (D.C. Cir. Jan. 25, 2013).

Our sister circuits disagree. In *NLRB v. Whitesell Corporation*, 638 F.3d 883, 888 (8th Cir. 2011), the Eighth Circuit considered whether the Board had jurisdiction to reissue an order that had been vacated for lack of a quorum in light of *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). Like this Court's judgment in *Noel Canning I*, the Eighth Circuit's order denying the Board's application for

enforcement did not remand the case. *See NLRB v. Whitesell Corp.*, 385 F. App'x 613, 614 (8th Cir. 2010) (unpublished per curiam). Nonetheless, when considering the authority of a properly constituted Board to reissue the order, the Eighth Circuit stated that it had "expected that the Board would visit the merits of th[e] case again" with a full complement of members. *Whitesell Corp.*, 638 F.3d at 889. Because the denial of enforcement had been based on the lack of quorum, not the merits, the Eighth Circuit held that its prior decision on the *New Process* issue did "not preclude the Board, now properly constituted, from considering [the merits] anew and issuing its first valid decision." *Id.* The Seventh and Fourth Circuits have reached the same conclusions in the wake of *Noel Canning II*. *See Big Ridge, Inc.*, 808 F.3d at 711 (holding that when it vacated a Board decision without remand because the Board lacked a proper quorum, it had "expected the Board to consider the case anew once it regained a quorum"); *Huntington Ingalls Inc.*, 631 F. App'x at 131 (holding that "[a] decision finding the lack of a proper quorum clearly contemplates further Board action").

Petitioner provides no convincing reason for us to interpret our *Noel Canning I* mandate differently than our sister circuits have interpreted theirs. Noel Canning points to several cases in which courts have rebuked the Board for reopening a matter in the absence of a remand—most notably, *Int'l Union of Mine, Mill & Smelter Workers v. Eagle-Picher Mining & Smelting Co.*, 325 U.S. 335 (1945); *George Banta Co. v. NLRB*, 686 F.2d 10 (D.C. Cir. 1982); and *NLRB v. Lundy Packing Co.*, 81 F.3d 25 (4th Cir. 1996)—but, as the Seventh Circuit observed when confronted with many of the same precedents, "all of these cases can be distinguished because they deal with appellate court rulings on the merits, whereas . . . the case at hand involve[s] denial[] of

enforcement due to lack of a quorum." *Big Ridge, Inc.*, 808 F.3d at 712. This is a distinction with a difference.

When a court affirms or rejects an agency's decision on the merits, parties to the litigation have important interests in the finality of that decision. *See Eagle-Picher*, 325 U.S. at 340 ("The party adverse to the administrative body is entitled to rely on the conclusiveness of a decree entered by a court to the same extent that other litigants may rely on judgments for or against them."). Those interests are absent when a court rules only that an administrative body never had a quorum to issue a decision in the first place. *See Huntington Ingalls, Inc.*, 631 F. App'x at 130-31. In fact, far from promoting finality, Noel Canning's interpretation of this Court's mandate in *Noel Canning I* actually "deprives the employees" and the company itself "from having [the case] resolved on the merits once and for all by this court." *Id.*

After the Supreme Court issued its ruling in *Noel Canning II*, this Court remanded more than a dozen pending cases to the Board, which by then had five validly appointed members, so that properly constituted panels could issue new rulings on the merits. *Cf. Nguyen v. United States*, 539 U.S. 69, 83 (2003) (finding remand to court of appeals "appropriate" after a case was decided by an improperly constituted panel). By contrast, when this Court decided *Noel Canning I*, we did not remand: indeed, "at that time, there was no properly constituted Board to which [this Court] could remand the proceedings." *Big Ridge, Inc.*, 808 F.3d at 711. Noel Canning's attempt to exploit these circumstances in order to prevent the Board from resolving its case contradicts the principle that a "mandate is to be interpreted reasonably and not in a manner to do injustice." *Bailey v. Henslee*, 309 F.2d 840, 844 (8th Cir. 1962) (internal quotation marks and citation omitted). Here, the Board's decision to reconsider the

merits of the case and issue a new decision and order was not only consistent with this Court's *Noel Canning I* mandate, but also reasonable and in furtherance of justice.

We offer one further thought with respect to Noel Canning's petition. We recently observed in a different context that "common sense sometimes matters in resolving legal disputes." *Southern New England Telephone Co. v. NLRB*, 793 F.3d 93, 94 (D.C. Cir. 2015). It is not totally consistent with common sense to suggest that when a petition has been filed with an administrative agency and that agency reached a decision but a court vacated the decision for reasons unrelated to the merits of the petition, the merits issues in the case must remain forever undecided. In other words, it seems to us highly unlikely that the law would establish that a question properly presented to the labor board must pend forever if the board for procedural or quorum-related reasons invalidly entered its first order.

Turning to the Board's cross-application for enforcement, we note that, in its opening brief, Noel Canning does not contest the Board's findings that it violated Section 8(a)(1) and (5) of the NLRA by refusing to reduce to writing and execute a collective bargaining agreement arrived at through collective bargaining with the Teamsters Local 760. Therefore, we may summarily enforce the 2014 decision and order. *See, e.g.*, *Allied Mech. Servs., Inc. v. NLRB*, 668 F.3d 758, 765 (D.C. Cir. 2012) (uncontested Board findings may be summarily enforced). *See also Fox v. Gov't of D.C.*, 794 F.3d 25, 29 (D.C. Cir. 2015) (argument not raised in an opening brief is forfeited). Moreover, in *Noel Canning I*, this Court concluded that the findings in the Board's 2012 decision and order, which were adopted by reference in its 2014 decision and order, were supported by substantial evidence. *See* 705 F.3d at 493-96. After reviewing the record

and the parties' briefing, we see no reason to depart from that conclusion here.

CONCLUSION

For the foregoing reasons, we deny Noel Canning's petition for review and grant the Board's cross-application for enforcement.

So ordered.

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15-1029

September Term, 2015
FILED ON: MAY 17, 2016

NOEL CANNING, A DIVISION OF THE NOEL CORPORATION,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

Consolidated with 15-1046

On Petition for Review and Cross-Application
for Enforcement of an Order
of the National Labor Relations Board

Before: ROGERS and PILLARD, *Circuit Judges*, and SENTELLE, *Senior Circuit Judge*

JUDGMENT

These causes came on to be heard on the petition for review and cross-application for enforcement of an order of the National Labor Relations Board and on the briefs of the parties. On consideration thereof, it is

ORDERED and **ADJUDGED** that the petition for review is denied and the cross-application for enforcement is granted, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/

Ken Meadows
Deputy Clerk

Date: May 17, 2016

Opinion for the court filed by Senior Circuit Judge Sentelle.